



Commander's Legal Reference Handbook



Prepared by the
Staff Judge Advocate to the
Commandant of the Marine Corps
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TABLE OF CONTENTS

Part I: Ethics/Standards of Conduct

Ethics/Standards of Conduct -- Common Issues	Tab A
Fundraising	Tab B
Gifts to the Marine Corps	Tab C
Gifts of Travel.	Tab D
Political Activities	Tab E
Participation in Non-Federal Entities	Tab F
Use of Government Transportation	Tab G
Personal Liability of Commanders	Tab H

Part II: Military Justice

Unlawful Command Influence	Tab I
Processing Allegations of Misconduct in the Military .	Tab J
Legal Authority of Frocked Officers	Tab K
Setting Aside Nonjudicial Punishment	Tab L
Officer Misconduct Cases	Tab M
Administrative Separation for Homosexual Conduct . .	Tab MC

Part III: Operational Law

International Criminal Court	Tab N
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Part IV: Legal Assistance

Spouse and Child Support Requirements	Tab O
Tax Deductions for Expenses Incurred as a Volunteer .	Tab P
Citizenship Applications	Tab Q
Improper Insurance Solicitations	Tab R

INFORMATION PAPER

Subj: ETHICS/STANDARDS OF CONDUCT -- COMMON ISSUES

Ref: (a) 5 C.F.R. § 2635 (1995)
(b) DoD Directive 5500.7-R, Joint Ethics Regulation,
of 30 Aug 93

1. **Bedrock Standards.** The purpose for standards of conduct is to ensure public confidence in the Government by promoting ethical conduct and avoiding fraud, waste, and abuse. This is accomplished by adherence to the following bedrock standards when confronted with an ethics issue. We are prohibited from:

- a. using or appearing to use public office for private gain;
- b. giving or appearing to give preferential treatment to any individual or entity;
- c. impeding or appearing to impede Government efficiency or economy;
- d. losing or appearing to lose complete independence or impartiality;
- e. making or appearing to make Government decisions outside Government channels; and
- f. doing or appearing to do anything that adversely affects the confidence of the public in the integrity of the Government.

2. **Authority.** Ethics and standards of conduct regulations are found in the references. Reference (b) has specific sections for DoD military and civilian personnel and also republishes reference (a).

3. **Scope of Coverage.** All naval personnel are covered. This includes active duty military personnel, civilian personnel, nonappropriated fund employees, special Government employees, and Reservists.

Tab A

Subj: ETHICS/STANDARDS OF CONDUCT -- COMMON ISSUES

4. **Applicable Sanctions.** Military: administrative action, nonjudicial punishment, courts-martial, or civil criminal prosecution. Civilian: appropriate administrative action, and in some cases, criminal prosecution.

5. **Summary of Common Issues**

a. **Conflict of Interests.** DoD employees must avoid conflicts of interests. "Conflict of interest" is defined as any personal, business, professional activity, or financial interest that places an individual in a position of conflict between private interests and the public interests related to the duties of the individual's official position, including an organization that the employee serves as officer, director, trustee, general partner or employee. Interests of the servicemember include those of spouse, children, and other household members. DoD employees must report conflicts to an appropriate supervisor. Conflicts of interest are resolved by disqualification from duties related to conflict, divestiture of the interest, or removal from the position.

b. **Confidential Financial Disclosure Report (OGE FORM 450).** Personnel of the grade O-6/GS-15 and below are required to submit an annual Office of Government Ethics (OGE) Form 450 on 31 Oct of each year if their responsibilities require them to exercise judgment in making Government decisions or in taking Government action for contracting or procurement, regulating or auditing private or other non-Federal enterprises, or other activities in which the final decision or action may have economic impact on the interests of any non-Federal activity. The reporting period is the preceding 12 months ending 30 September of each year (or any portion thereof not covered by a new entrant report). The OGE Form 450 is reviewed by the filer's immediate superior and an ethics counselor. Officers frocked to the grade of brigadier general must file an OGE Form 450 within 30 days of their frocking.

c. **Executive Personnel Financial Disclosure Report (SF 278).** Regulations require general officers and Senior Executive Service officials to file a Public

Subj: ETHICS/STANDARDS OF CONDUCT -- COMMON ISSUES

Financial Disclosure Form (SF 278) as a "new entrant," "annually" by 1 May of each year, and upon their retirement. Wrongful failure to do so warrants a \$200.00 fine. SJA to CMC notifies general officers of this requirement by personal letter and maintains these reports. Filers should submit their reports to their supervisor (their reporting senior). Your local ethics counselor (usually the SJA) will assist you in preparing the report. Officers promoted to the grade of brigadier general must file this report within 30 days of promotion.

d. **Annual Ethics Training.** All DoD employees who file an SF 278 or OGE Form 450 must receive ethics training annually. Annual ethics training must be accomplished in person by a qualified instructor or by telecommunications, computer-based training, or video that is prepared by a qualified instructor.

e. **Honoraria.** Ethical rules prohibit DoD members (regardless of grade) from accepting compensation for teaching, speaking, or writing that relates to official duties. Military personnel and civilian employees may accept payment or anything of value for a speech, appearance, or article on any matter that does not relate to their official duties. Consultation with your ethics counselor is advised.

f. **Solicited Sales.** Servicemembers cannot solicit sales to personnel who are junior in grade or under their supervision. In the absence of coercion or intimidation, this rule does not prohibit the occasional and non-commercial sale or lease of real or personal property, or off-duty employment of Naval personnel in retail stores.

g. **Misuse of Government Property and Manpower.** Government facilities, property, and manpower may be used only for official Government business.

h. **Misuse of Military Titles.** Commanding officers often receive requests from non-Federal entities for their time and support for fundraising projects. Although most of these projects are worthy causes, DoD members may not use or allow the use of their official titles, positions,

Subj: ETHICS/STANDARDS OF CONDUCT -- COMMON ISSUES

or organization names in any way that tends to suggest official endorsement or preferential treatment by DoD. Military grade and military department as part of an individual's name (e.g., Colonel Smith, U.S. Marine Corps) may be used, however, in the same way as other conventional titles such as Mr., Ms., or Honorable.

i. **Gifts From Outside Sources.** DoD members cannot accept gifts because of their official position or from a prohibited source. This rule also applies to the member's spouse and minor children. Regardless of the above rule, you may accept:

(1) unsolicited gifts valued at \$20.00 or less from any source, but no more than \$50.00 from any one source in a given year;

(2) gifts based on a personal relationship (from family or friends; gift unrelated to official duties);

(3) commercial discounts available to the public or to a class consisting of all employees (e.g., "military discounts.");

(4) bona fide awards, prizes, or honorary degrees;

(5) gifts based on outside business relationships;

(6) free attendance and meals at widely-attended gatherings;

(7) social invitations from non-prohibited sources;

(8) gifts of nominal value (\$245.00 or less) from a foreign Government;

(9) meals, refreshment, and entertainment in foreign areas; and

(10) gifts of travel from non-Federal sources.

Note: These exceptions are complex and contain many preconditions before acceptance. Consult your ethics counselor first.

Subj: ETHICS/STANDARDS OF CONDUCT -- COMMON ISSUES

j. **Acceptable Items.** The following items are not considered gifts and may be accepted:

(1) greeting cards, plaques, and trophies that have little intrinsic value;

(2) modest refreshments not part of a meal (coffee and donuts);

(3) benefits available to the public (discounts, bank loans, reduced airfare); and

(4) anything paid for or accepted by the Government (e.g., using frequent flyer points to get a seat upgrade for official travel).

Note: More restrictive rules apply if you are a "procurement official."

k. **Gifts From a Group that Includes a Subordinate (includes military and DoD civilians).**

(1) General rule: we cannot--

(a) give a gift or solicit another to give a gift to an "official superior" (someone who directs or evaluates your performance);

(b) accept a gift from an employee who receives "less pay" unless the two are not in a senior-subordinate relationship AND there is a personal relationship between the two employees that would justify the gift.

(2) Exceptions: we may accept or give--

(a) items of \$10.00 or less on an occasional basis when gifts are traditionally given (birthday, Christmas, etc.);

(b) food and refreshments shared at the office;

Subj: ETHICS/STANDARDS OF CONDUCT -- COMMON ISSUES

(c) personal hospitality at a residence/hostess gifts;

(d) On January 3, 1997, the Deputy Secretary of Defense approved a change to reference (b). This change now permits groups of employees to give gifts exceeding \$300 in value to superiors on special infrequent occasions that terminate the superior-subordinate relationship, if the gifts are appropriate to the occasion and are uniquely linked to the departing employee's position or tour of duty and commemorate the same.

6. **Advice.** Standards of Conduct advice may be obtained from your local staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-1513/2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

INFORMATION PAPER

Subj: FUNDRAISING

Ref: (a) DoD Directive 5500.7-R, Joint Ethics Regulation, of
30 Aug 93
(b) MCO P1700.27, Marine Corps MWR Policy Manual
(c) DoD Instruction 1015.10, Programs for Military
Morale, Welfare, and Recreation, of 3 Nov 95
(d) SECNAVINST 4001.2G
(e) MCO P5800.16

1. General Policy

a. **Official Support of Fundraising Limited.** Pursuant to reference (a), DoD components shall **not** officially support and DoD employees may **not** officially endorse or participate in membership drives or fundraising for any non-Federal entity, **except:** the Combined Federal Campaign, emergency and disaster appeals approved by the Office of Personnel Management, the Navy-Marine Corps Relief Society, and other organizations composed of DoD employees or dependents when fundraising among their own members and as approved by the head of the command or organization. For these purposes, fundraising means raising funds for a nonprofit organization through solicitation of funds, sale of items, or participation in a fundraising event.

b. **Fundraising for Commercial Interests.** DoD policy prohibits Government participation in events clearly sponsored by, or conducted for the benefit of, commercial interests.

c. **Voluntariness.** Where solicitation is authorized, the request must be made in an environment and manner that ensures that contributions are in fact voluntarily made. Any actions that do not allow free choices or create the appearance that Marine Corps personnel do not have a free choice to give any amount, or not to give at all, are prohibited.

2. On-the-Job Solicitations. Marine Corps personnel shall be given the opportunity through on-the-job solicitations to make truly voluntary contributions to such charitable health and welfare agencies within the local Combined Federal Campaign,

Tab B

Subj: FUNDRAISING

Navy-Marine Corps Relief Society, and other specifically approved groups, as they desire to support. Such solicitations shall be conducted in strict conformity with guidelines published annually.

3. **Other Solicitations.** Subject to other restrictions, DoD employees may voluntarily participate in non-Federal activities in their **personal** capacities, provided they act exclusively outside their official position. Purely personal, unofficial, volunteer efforts to support fundraising are not prohibited where the efforts do not imply DoD endorsement. The head of the command or organization, usually the installation commander, may authorize such activities outside the workplace, such as at quarters or community support centers.

a. **Family Quarters on Military Installations.** Voluntary agencies may be permitted to solicit at private residences or at family quarters in unrestricted areas of military installations at the discretion of the local installation commander.

b. **Public Entrances of Federal Buildings and Installations.** The above restrictions do **not** operate to prevent local DoD employees' efforts to aid the unfortunate. This may include, but is not limited to, the sale of token items, such as veterans' group "poppies," and the placement of collection boxes, which may be permitted at public entrances or in public concourses of Federal buildings or installations that are normally open to the general public. The decision to authorize such collections rests with the commanders or heads of field installations or activities.

c. **Duty Status.** Solicitations shall not be conducted by military or civilian personnel in their official capacities, whether during duty or non-duty hours. Marine Corps personnel shall not use or allow the use of their titles, grades, or positions in connection with fundraising for private organizations. Unless authorized by CMC (PA), Marines shall not wear the uniform while engaged in off-the-job solicitations for any purpose from the public.

4. **Money Raising Conducted by Morale, Welfare, and Recreation (MWR) Activities.** Per reference (b), money-raising events of short duration may be held in support of MWR activities provided:

Subj: FUNDRAISING

a. all members or patrons of the sponsoring MWR activity must be authorized patrons;

b. such money-raising activities must be conducted entirely on Federal property;

c. requests for funds or participation are restricted to authorized patrons; and

d. all proceeds from the fundraising event must be used by the sponsoring MWR activity solely for the benefit of authorized patrons.

5. Solicitation for Commercial Sponsorship of MWR Events.

Pursuant to reference (c), DoD authorized MWR activities to solicit commercial sponsorship from U.S. firms for some MWR events. Guidelines are provided by DoD and CMC (letter of 11 Oct 88) and prohibit solicitation of tobacco or alcoholic beverage sponsorship.

6. Birthday Ball

a. **Money-Raising Generally Permitted.** Money-raising events of short duration for the purpose of generating money for that sponsoring group may be permitted. See paragraph 4 of this paper for additional qualifications.

b. **Solicitations Prohibited.** No member of the Marine Corps, may, in his official capacity, solicit donations from private entities or individuals for funds to be applied to the birthday ball.

c. **Gifts Accepted in Accordance with MCO P5800.16.** Outright gifts, unconditional and unsolicited, must be handled in compliance with references (d) and (e).

7. Local Questions. Legal questions should be referred to your local staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-1513/2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

INFORMATION PAPER

Subj: GIFTS TO THE MARINE CORPS

Ref: (a) MCO P5800.16
(b) DoD Directive 5500.7-R, Joint Ethics Regulation, of
30 Aug 93

1. **General Rule.** Pursuant to reference (a), no gift will be accepted by the Marine Corps or by an individual Marine, regardless of value, if either presently or in the future, it has the potential to embarrass the Marine Corps. Consider:

(a) Will the public believe the gift is given for ulterior motives, i.e., will the donor expect future favors in return?

(b) Does it create an actual or perceived conflict of interest between donor and USMC?

(c) Is the donor a defense contractor (does business or is seeking to do business with any DoD component)?

(d) Does the gift come from a donor (individual, group, or association) with whom we would not like the Marine Corps linked?

(e) Is acceptance of the gift otherwise restricted by reference (b)?

(f) Does the gift have unduly burdensome conditions associated with it (will the expenditure of funds or administrative efforts outweigh the value of the gift)?

2. **Solicitation of Gifts.** Unless authorized by the Secretary of the Navy, requests for gifts or contributions for Marine Corps institutions, organizations, or personnel shall not be initiated by persons in the Marine Corps.

3. **Acceptance of Unsolicited Gifts.** Unsolicited gifts of personal property to the Marine Corps may be accepted by the appropriate acceptance authority. Pursuant to reference (a):

Tab C

Subj: GIFTS TO THE MARINE CORPS

a. Officers exercising special court-martial jurisdiction may accept gifts of a value not exceeding \$1500.00.

b. General officers in command, district directors, SJA to CMC, and Counsel for CMC may accept gifts of a value not to exceed \$10,000.00.

c. CMC may accept gifts of personal property to the Marine Corps of a value less than \$50,000.00.

d. In addition, any commander may accept unsolicited gifts of perishables or consumables such as food, nonalcoholic beverages, flowers, regardless of donor or value, and subject only to the "General Rule" above. This acceptance is of items that will be consumed at one specific event; i.e., unit picnic, command event, or the like.

e. Gifts of real property can be accepted only by the Secretary of the Navy.

4. **Gifts from Foreign Governments.** No Marine Corps personnel shall request or otherwise encourage the offer of a gift from a foreign government, and such gifts, whenever possible without embarrassment, shall be declined. Special handling and processing may be required. Refer to references (a) and (b).

5. **Procedure for Handling Gifts**

a. Gifts that clearly violate the "General Rule" above shall be immediately refused by the commander to whom the gift is offered.

b. All other offers must be forwarded to the cognizant acceptance authority per reference (a). Gifts of money can be accepted locally, but the money must be forwarded to CMC (P&R) for deposit in the Navy Gift Account. Gifts of money tendered in the form of negotiable instruments must be made payable to the Department of the Navy. P&R then provides the command with appropriation data to draw the money. The money must not be spent or obligated until this action is accomplished.

c. In cases where the gift is intended to reward superior performance, the Marine Corps will determine the recipient, rather than the donor (i.e., Marine of the Quarter, Recruiter of the Year, and the like).

Subj: GIFTS TO THE MARINE CORPS

d. Commanders may take temporary possession of property while making a determination concerning acceptance, or while awaiting the acceptance decision of higher authority. No gift will be taken up on command property accounts until formally accepted by appropriate authority.

6. Gifts for Marine Corps Balls or Other Official Functions.

Unsolicited gifts offered to help support Marine Corps birthday balls or other official functions will be treated the same as other gifts. Soliciting funds is prohibited.

7. **HQMC Advice.** CMC (JAR) at DSN 224-1513 or (703) 614-1513 has responsibility for advising on all gift acceptance matters, except those dealing with real estate and commercial interests (patents, copyrights, trademarks), which are the responsibility of Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

INFORMATION PAPER

Subj: GIFTS OF TRAVEL

Ref: (a) 41 C.F.R. §§ 301, 304 (1998)
(b) 31 U.S.C. § 1353 (1993)
(c) MCO P5800.16

1. **Issue**. By what legal and regulatory mechanism may Marine Corps officers, enlisted personnel, civilian employees and spouses accept gifts of travel from non-Federal sources?

2. **Answer**. The framework set forth below allows for the acceptance, on behalf of the Government, of certain expenses associated with travel if specified conditions are met.

3. **Analysis**

a. **Government Service Administration (GSA) Regulations Control**. The GSA regulations published at reference (a) are the controlling regulations in this area and should be consulted directly. The GSA regulations are issued under a specific grant of authority for this purpose under reference (b).

b. **Acceptance Criteria**. The gift of travel must be made to the Government, and the individual may not accept the gift directly. The legal distinction is that the individual is not accepting the gift of travel on his own behalf, but, rather on behalf of the Government.

(1) A gift of travel may be accepted where the authorizing official determines the payment is: (a) for travel relating to an official's duties under official travel authorizations; (b) for attendance at a meeting or similar function; and (c) from a non-Federal source that is not disqualified.

(2) A "meeting or similar function" is a conference, seminar, speaking engagement, symposium, training course, or similar event that takes place away from the employee's official station.

(3) To accept such a gift of travel, the donating

Tab D

Subj: GIFTS OF TRAVEL

organization or entity must not be conflicted. This analysis is conducted with a view of all the circumstances, such that a "reasonable person with knowledge of all the facts" would not question the integrity of the agency or its programs. The analysis is guided by, but not limited to, the identity of the non-Federal source, the purpose of the meeting or function, the identity of other expected participants, the nature and sensitivity of any matter pending before the agency affecting that source, and the monetary amount and character of the travel benefits. The authorizing official may find that acceptance in part, or to attend only part of the function, is appropriate. Of course, a gift of travel may fit these criteria and still be refused by the acceptance authority as being contrary to the interests of the Marine Corps. The individual has no right to the gift of travel.

c. **Acceptance Authority is Keyed to Gift Acceptance Authorities.** Gift of travel acceptance is keyed to gift acceptance, per reference (c). Gift acceptance authorities have certain limited monetary authority, which should cover most gift of travel acceptance situations. All gifts of travel and related expenses must be reported to CMC (JAR) twice annually by the acceptance authorities. This report should include the name of employee, dates of travel, description of meeting, and identification of the non-Federal entity. CMC (JAR) will solicit reports from commands, consolidate the information, and forward it to the Office of Government Ethics for final disposition.

4. **Local Questions.** Legal questions should be referred to your staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-1513/2510, Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

INFORMATION PAPER

Subj: POLITICAL ACTIVITIES

Ref: (a) DoD Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty, of 15 Jun 90
(b) DoD Directive 5500.7-R, Joint Ethics Regulation, of 30 Aug 93
(c) Office of Personnel Management Political Activity of Federal Employees, 5 C.F.R. § 733 (1999)
(d) SECDEF WASHINGTON DC 171527Z MAY 99

1. **Purpose.** With each partisan political season, commanders and their judge advocates will find it useful to review applicable guidance on political activities by Federal employees. Different sets of rules apply depending on what position the employee holds with the Federal government. This point paper discusses the rules governing military personnel and civilian employees. It also discusses some of the rules governing the use of DoD facilities and equipment in support of political activities.

2. **Members of the Armed Forces.** The relevant guidance for military personnel is in reference (a). Chapter 6 of reference (b) reprints this directive as well. The range of political activities this regulation permits for members of the armed forces is significantly narrower than for civilian employees.

a. **Acceptable Activities.** A member on active duty may vote, express his or her personal opinion on political issues and candidates, contribute to political organizations, and attend political rallies when not in uniform.

b. **Unacceptable Activities.** Members on active duty, whether or not in uniform, may not:

(1) be a candidate for civil office (with some narrow exceptions);

(2) participate in partisan political management of campaigns or make speeches in the course thereof;

Tab E

Subj: POLITICAL ACTIVITIES

(3) participate in any radio, TV, or other program or group discussion as an advocate of a partisan political party or candidate;

(4) display large political signs on a privately-owned vehicle (bumper stickers that support a party or candidate are permissible);

(5) solicit or receive a campaign contribution from another member of the armed forces or from a civilian employee of the United States for promoting a political objective or cause;

(6) allow or cause to be published partisan political articles signed or written by the member that solicit votes for or against a partisan political party or candidate;

(7) speak before a partisan political gathering of any kind promoting a partisan political party or candidate;

(8) perform clerical or other duties for a partisan political committee during a campaign or on an election day;

(9) march or ride in a partisan political parade; or

(10) serve in any official capacity or be listed as a sponsor of a partisan political club.

c. **Further Analysis.** See enclosure (3) to reference (a) for more examples of permissible and impermissible political activities. Note that reference (a) does not preclude participation in local nonpartisan political campaigns, initiatives, or referendums when not in uniform and when such participation does not imply any official DoD position or interfere with the member's official duties.

3. **Civilian Employees.** Reference (c) contains guidance for civilian employees. Chapter 6 of reference (b) (Change 1) reprints this section. In general, civilian employees may participate in political organizations, campaigns, and elections. As with all general rules, however, there are a host of limitations and exceptions. The following is a synopsis of the prohibitions that apply to civilian employees.

Subj: POLITICAL ACTIVITIES

a. **Prohibitions Applicable to All DoD Civilian Employees.** Civilian employees generally may not:

(1) use their official authority or influence to interfere with or affect the result of an election;

(2) solicit, accept, or receive political contributions (with some very narrow exceptions); solicit, accept, or receive uncompensated volunteer services from an individual who is a subordinate; or allow their official titles to be used in connection with fundraising activities;

(3) run for nomination or election to public office in a partisan election (with some narrow exceptions);

(4) solicit or discourage the political activity of any person who is a participant in any matter before or being carried out by the DoD;

(5) engage in political activities (to include wearing a political button) while on duty, while in a Government-occupied office or building, while wearing an official uniform, badge, insignia, or other similar item, or while using a Government vehicle; or

(6) make a political contribution to their employer or employing authority.

b. **Prohibitions Applicable to Senior Civilian Employees and Employees in Particularly Sensitive Positions.** Additional prohibitions apply to more senior civilian employees, including all career Senior Executive Service (SES) employees, administrative law judges, and certain employees in sensitive positions, such as members of Contract Appeal Boards, and employees (except Presidential appointees confirmed by the Senate) of DIA and NSA. Additional prohibitions also apply to all Presidential appointees confirmed by the Senate and all non-career SES members.

4. **Logistical Support for Political Activities.** In general, commanders may not permit the use of DoD facilities to support political activities.

a. **DoD Guidance.** The Secretary of Defense reiterated the applicable guidance for logistical support for political

Subj: POLITICAL ACTIVITIES

activities in reference (d), "Public Affairs Policy Guidance-- Election Year 2000." Highlights:

(1) Installation commanders shall not permit the use of installation facilities by any candidate for political assemblies, media events (including speeches), fundraisers, press conferences, or any other activity that could be construed as political in nature.

(2) Candidates may be given the same access to installations as any other visitor is permitted. Commanders will, however, inform candidates that, while on the military installation, all political activities and media events are prohibited.

(3) All requests for community relations support to political meetings, ceremonies, and like events, including bands, color guards, personnel, and speakers, whether on the installation or in the civilian community, will be denied.

(4) Requests from politicians to tape or film campaign commercials in front of military equipment on military property owned or leased by the Government will be denied.

(5) DoD newspapers will not carry campaign news, partisan discussions, cartoons, editorials, or commentaries dealing with political campaigns, candidates, or issues.

b. **Further Analysis.** See the text of reference (d) for further guidance, OSD points of contact, and references.

INFORMATION PAPER

Subj: PARTICIPATION AND SERVICE WITH NON-FEDERAL ENTITIES

Ref: (a) DoD Directive 5500.7-R, Joint Ethics Regulation, of
30 Aug 93

1. **Participation**. There are two ways in which a DON employee may participate in or serve with a non-Federal entity (NFE): (1) in his or her official capacity; or (2) in his or her private or personal capacity.

2. **Official Capacity Service**

a. **Liaison Role Permitted**. Subject to the limited exception in paragraph 2d below, the only way for DON employees to serve within the scope of their official position in an NFE is to serve in a liaison role. This status is specifically recognized in section 3-201 of reference (a). DON employees may serve as liaisons when appointed by the head of the DoD component command or organization. A determination must be made that a significant and continuing DoD interest will be served by the representation.

(1) Liaisons serve the interests of the DON. They owe loyalty to the DON and not to the NFE.

(2) Liaisons function only in an advisory position to the NFE. They may not be directors or board members of the NFE. In fact, liaisons may not participate in the management of the organization at all.

(3) Since liaisons are serving as official representatives of the DON, it is permissible to send liaisons TAD to perform liaison duties.

b. **Liaison Role and Advisory Boards**. Some defense contractors invite senior DoD officials to sit on their "advisory boards." In August of 1996, DoD General Counsel advised that this type of DoD liaison activity is not permitted because of long-standing DoD policy that DoD employees may not serve in any way as advisors to defense contractors or entities that seek to do business with DoD.

Tab F

Subj: PARTICIPATION AND SERVICE WITH NON-FEDERAL ENTITIES

c. **Management Role Prohibited.** Again, subject to paragraph 2d below, DON employees may not participate in the management of NFEs *in their official capacity*. This determination is based on the rationale that DoD officials cannot serve both the interests of DoD and the private organization. If the individual employee seeks to serve with an NFE as a board member, he may do so only if such service can be classified as personal capacity service.

d. **Management Exception.** With prior written approval from DoD General Counsel, employees may serve in limited management roles for specifically designated organizations, such as the Navy-Marine Corps Relief Society and organizations supporting the service academies. Refer to section 3-202 of reference (a), Change 4.

3. Personal Capacity Service

a. **Personal Relationships with Non-Federal Entities Permitted.** Marines are permitted, and even encouraged, to join, participate in, or hold office (as board members, trustees, or officers) in NFEs in their private capacities. Service with NFEs is desired because it often promotes professional or personal development and helps the Marine become an active part of the local military or civilian community. When personally participating in an NFE, however, a Marine needs to be aware of the ethical rules that govern participation in these organizations.

b. **Determining Personal Capacity Service.** There is no black or white rule defining whether service with an NFE is in a private capacity or is official service on behalf of the Marine Corps. Certain factors are useful in defining membership status with NFEs. Some factors that may be indicative of private capacity service are included below:

(1) You were asked to serve with the NFE because of your private interest in the organization and not because of your official grade or billet;

(2) You have a private, personal long-standing or historical family interest in the organization;

(3) Your predecessor did not hold the office by virtue of billet alone (i.e., the office is not a historically-granted "ex-officio" position); or

Subj: PARTICIPATION AND SERVICE WITH NON-FEDERAL ENTITIES

(4) You hold the position because of particular expertise (i.e., banking, insurance, etc.) or talent.

c. **The Don'ts of Private Capacity Service.** If you are serving in your private capacity with an NFE:

(1) You may not use your office, title, or position in connection with your personal participation;

(2) You may not personally solicit subordinates or any other prohibited sources (usually DoD contractors), or permit the use of your name in a solicitation that targets subordinates or prohibited sources in NFE membership drives or fundraising campaigns;

(3) You may not participate in and must disqualify yourself from acting on official DoD matters that affect the financial interests of that organization. This is true even though someone else might make the final decision. You must remain impartial in your official duties;

(4) You may not represent your organization before the Government;¹

(5) You may not use Government resources, personnel, or official time for unauthorized purposes. Certain agency designees (supervisors and ethics counselors), however, may permit limited use of official resources (but not personnel) if the use:

- (a) does not adversely affect mission;
- (b) is reasonable in duration and frequency;
- (c) serves a legitimate public interest;
- (d) does not reflect adversely on DoD; and
- (e) creates no significant additional costs.

(6) You may not divulge nonpublic information; and

¹ Although Pub. L. 104-177 (110 Stat. 1563), signed August 6, 1996, permits Federal personnel to represent professional, recreational, or similar groups if the majority of the organization's members are Federal employees or family members thereof, this exception does not apply to obtaining a grant or contract from the Federal Government for the NFE.

Subj: PARTICIPATION AND SERVICE WITH NON-FEDERAL ENTITIES

(7) You may not give your organization preferential treatment.

d. **Compensation.** As a matter of personnel policy, on 23 July 1996, the Deputy Secretary of Defense directed that general officers may not accept compensation as an officer or a member of the board of an NFE. Exceptions may be granted only by SecNav.

4. **Consult Your Local Staff Judge Advocate When Questions Arise.** If you have questions or would like more details concerning personal capacity service, contact your staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

INFORMATION PAPER

Subj: USE OF GOVERNMENT TRANSPORTATION BETWEEN RESIDENCE AND PLACE OF EMPLOYMENT

Ref: (a) 31 U.S.C. § 1344
(b) DoD Directive 4500.36-R of 10 Apr 85
(c) DoD Instruction 4515.7 of 31 Jul 95
(d) MCO P11240.106A, paras. 2003.2 and 2010
(e) 31 U.S.C. § 1344(b)
(f) MCO P1100.71, para. 3203.4
(g) 3 Op. Off. Legal Counsel 329 (1979)
(h) 41 C.F.R. §§ 101-38.300-301.2
(i) DoD Instruction 4515.7 of 31 Jul 85
(j) SECNAVINST 11240.17C
(k) 31 U.S.C. § 1349

Encl: (1) Examples

1. **General Rule.** DoD and DON policy is to use government transportation for "official purposes" only. Within the United States, "official purpose" does not include transportation between a person's residence and place of employment (i.e., regularly assigned duty station, place of duty, or workplace), unless authorized by the references. Motor vehicle transportation between place of work and official activities in the local area is authorized, but side trips for unofficial purposes are not allowed.

2. **Official Use.** References (a) and (b) allow transportation between a residence and various locations when required for the performance of field work (see paragraph 5, below), or when essential for the safe and efficient performance of intelligence, counter-intelligence, protective services, or criminal enforcement duties. Even when motor vehicle transportation is essential to the performance of official business, DoD-scheduled bus service or scheduled public transportation must be used before Government motor vehicles (GOVs). Pursuant to references (c) and (d), GOVs, however, are to be used before privately-owned motor vehicles or taxis on a reimbursable basis. **Furthermore, there are special rules which apply within the National Capital Region (NCR), as explained**

Tab G

Subj: USE OF GOVERNMENT TRANSPORTATION BETWEEN RESIDENCE AND PLACE OF EMPLOYMENT

below in paragraph 8. Also, as a result of the application of reference (e), the Commandant of the Marine Corps (CMC) is allowed motor vehicle transportation between his residence and place of employment.

3. **Convenience Justification Inappropriate.** Pursuant to references (a) and (d), transportation by GOV will not be provided where the justification is based solely or principally on reasons of grade, prestige, comfort, or personal convenience.

4. **Field Work.** Transportation may be approved by the head of the component concerned for personnel who are engaged in field work when the nature of their duties makes such transportation necessary and other transportation is not adequate (reference (b) governs). Approval authority may not be delegated. Pursuant to reference (d), "Field work" is duty performed, on the basis of valid orders issued by competent authority, by personnel who, while so engaged, do not report regularly to the same fixed office or post before entering upon official duties or at the close thereof (e.g., recruiters). Field work involves work at scattered locations away from a servicemember's normal place of duty. Although the reason for TAD may be to engage in certain field work, not all TAD would be classified as field work. Attending a professional school or conference on TAD would be an official duty, but may not be field work. Conversely, not all field work would be TAD, since a servicemember may return home every night from field duty conducted in the local area. In addition, certain policy level officers who engaged in general supervisory and administrative direction and control of various field forces would be engaging in official duties when supervising and administering field forces, but would not be engaged in field work (see reference (g).)

5. **Agency Head Approval.** Pursuant to reference (a), any determination to permit use of a GOV between a residence and place of employment must be made in writing by SecNav and include the details and reasons for authorization. The authorization shall be transmitted promptly to the Committee on Government Operation of the House of Representatives and the Committee on Governmental Affairs of the Senate. Reference (h) specifies that a copy of the authorization must be maintained within the agency, and a copy of the authorization must be furnished to GSA if a vehicle is provided through the Interagency Fleet Management System.

**Subj: USE OF GOVERNMENT TRANSPORTATION BETWEEN RESIDENCE AND
PLACE OF EMPLOYMENT**

6. National Capital Region (NCR)

a. Notwithstanding the above, special rules apply in the NCR. The NCR is designated as the District of Columbia, Montgomery and Prince Georges counties in Maryland, and Arlington, Fairfax, Loudoun, and Prince William Counties in Virginia, and all the cities and towns included within the outer boundaries of the foregoing counties.

b. In the NCR, the performance of official duties shall not be construed to include transportation over all or any part of the routes between domiciles and places of employment. Public and commercial transportation to commercial transportation terminals in the NCR is considered adequate for all but emergency situations, security requirements, and other unusual circumstances. Pursuant to references (i) and (j), since public and commercial transportation to and from Andrews Air Force Base or Davison Army Airfield is not routinely available, a DoD motor vehicle may be used on official business involving these air terminals. Except in extremely limited circumstances, no residence-to-place-of-employment use of Government transportation is authorized within the NCR. As previously noted, one such exemption pursuant to reference (b), authorizes CMC an individually-assigned vehicle with driver, within the NCR.

7. **Penalty for Abuse.** Under references (c) and (k), any officer or employee of the Government who willfully uses or authorizes the use of any Government passenger motor vehicle for other than official purposes shall be suspended from duty by the head of the DoD component concerned, without compensation, for not less than 1 month.

8. **Examples.** See enclosure (1) for specific examples of how these rules apply.

9. **Local Questions.** Legal questions should be referred to your staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-1513/2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

EXAMPLES

1. GOV transportation of a servicemember from his/her home to Andrews Air Force Base on TAD would be appropriate when there is in fact, no scheduled military or commercial reasonably available transportation.
2. GOV transportation of a guest speaker servicemember from his home in the National Capital Region to an official TBS mess night at Quantico, where he would return after normal working hours would not be appropriate. Although TBS is in Stafford County, a portion of the route is within the National Capital Region.
3. GOV transportation of a servicemember to a private social function such as birthday, anniversary, or wetting down would not be appropriate.
4. GOV transportation of a servicemember between locations on personal business such as shopping, banking, seeing financial counselors, legal, accounting, or tax advisors, dentists, or doctors would not be appropriate.
5. GOV transportation of a servicemember's spouse without the accompanying member, when no official purpose warrants the transportation would not be appropriate.
6. GOV transportation by a servicemember who is authorized a vehicle on a full time or trip basis, for private business or personal social engagements of the servicemember, family member, or others, is not appropriate.
7. GOV transportation is appropriate for military recruiters who proceed directly from their domiciles to conduct official recruiting matters when it is determined to be impractical for the recruiter to first proceed to an office location where the GOV is normally garaged.
8. GOV transportation of a servicemember between home and place of employment because the member is on call constantly or because the member must be prepared to leave his/her residence at any moment in the event of an emergency is not appropriate.
9. Radio-equipped, emergency-configured vehicles may be provided on a 24-hour-a-day basis to a commander who lives on a military installation, is charged with the overall responsibility for installation security and/or operational function, and cannot adequately discharge this responsibility without a 24-hour mobility and communication capability.
10. GOV transportation is appropriate for a medical officer while performing out-patient medical service away from a hospital.

Enclosure (1)

INFORMATION PAPER

Subj: PERSONAL LIABILITY OF COMMANDERS

1. **Background.** Military command includes potential personal liability for violations of Federal or State laws. In most instances, commanders are immunized from suit as long as their actions were within the scope of their official duties.

2. **Personal vs. Official Liability.** The Government assumes **all** responsibility for suits brought against commanders in their "official capacities." When sued in a "personal" capacity, the commander is personally at risk--and may feel that risk when, for example, trying to qualify for a mortgage or a loan. Two types of personal liability confront commanders: criminal and civil.

3. **Personal Criminal Liability**

a. Knowing, intentional acts that violate Federal or State law, e.g., not reporting an oil spill.

b. Negligent act contrary to Federal or State law, e.g., auto fatality due to alcohol.

c. Knowing, intentional act of subordinate, where commander knew (or should have known) of the action and had ability to control the action, e.g., storage of hazardous waste.

4. **Department of Justice (DoJ) Representation for Criminal Charges.** DoJ will represent a commander if the action giving rise to charges was:

a. Within "scope of employment" ("in scope").

b. Representation is in best interest of U.S. (highly unlikely if Federal prosecution).

5. **Personal Civil Liability** can arise on the same basis as personal criminal liability; consequences do not include imprisonment.

Tab H

Subj: PERSONAL LIABILITY OF COMMANDERS

6. DoJ Representation for Civil Suits

a. Same as for criminal cases.

b. If defendant "in scope", case may be removed to Federal court if originally filed in State court, and U.S. will be "substituted" as defendant.

7. Immunity

a. Commanders acting "in scope" are protected from civil common law tort actions. Federal Tort Claims Act requires U.S. to be substituted as the defendant and is **exclusive** remedy for plaintiff.

b. Limited immunity for "constitutional torts." (If commander violates a clearly-established constitutional right of an individual that a reasonable person would have cognizance of, then the commander is not immune from suit.)

c. Intramilitary immunity: "Feres doctrine" bars servicemembers from suing each other when injury is "incident to service."

8. Indemnification. Pending DoD directive would indemnify individuals for civil penalties, fines, and damages--if DoD (as opposed to DoJ) views actions giving rise to suit as "in scope." Until approved, there is no indemnification and individual commanders will be personally responsible for any judgment.

9. Insurance. No coverage available for criminal prosecutions. The few policies only cover actions that arise "within the scope of employment," which are the same cases where immunities are strongest.

10. "Immediate action" if sued. Contact your staff judge advocate immediately. He or she will coordinate representation, removal, and substitution issues with DoJ via the Office of the Judge Advocate General of the Navy.

11. Summary. No **commander** has been successfully sued or convicted (yet) in either State or Federal court for tortious or criminal conduct, although a few subordinate officers have. While the law offers commanders significant protections from liability, they are not, however, immune from successful

Subj: PERSONAL LIABILITY OF COMMANDERS

prosecution or suit. Consult your staff judge advocate immediately on issues relating to litigation.

INFORMATION PAPER

Subj: UNLAWFUL COMMAND INFLUENCE

1. **Purpose**. This paper provides information regarding unlawful command influence.

2. **Background**. Commanders must avoid statements or actions that amount to, or give the appearance of, any effort to exert unlawful influence over military justice proceedings. The military justice system is designed to promote good order and discipline in the armed forces while providing justice to those who stand accused of misconduct. One of the goals of the prohibition of command influence is to ensure public confidence that dispositions are based on the courts' application of the law to facts properly proven at trial, and not on predetermined edicts by interested commanders.

3. **Commanders' Role**. Commanders play an expansive, appropriate, and lawful role in the military justice system to include determining initial disposition of alleged offenses; selecting court-martial members; negotiating appropriate pretrial agreements; acting on the findings and sentence of courts-martial; and reviewing initial allegations of legal errors and requests for clemency. Commanders may not, however, seek to influence decisions of subordinate commanders with respect to actions regarding military justice proceedings; inhibit prospective testimony or appearance of witnesses; punish or reward court members on the basis of their rendered votes on court-martial findings or sentences; or punish or reward witnesses, counsel, or military judges for their proper participation in military justice proceedings. Commanders should also avoid making detailed policy statements concerning specific offenses or commenting on the outcome of judicial proceedings.

4. **Consequences**. Unlawful command influence in military justice proceedings can result in dismissal of charges against an accused, reversal of otherwise properly determined findings and sentences, relief for cause of the offending commander, and adverse media coverage.

Tab I

Subj: UNLAWFUL COMMAND INFLUENCE

5. **Summary.** Unlawful command influence is unnecessary and easy to avoid. Commanders should seek out their staff judge advocate's advice before publicly commenting upon any military justice matters.

INFORMATION PAPER

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

1. This paper summarizes how allegations of misconduct are disposed of in the United States Armed Forces. Consult your local staff judge advocate for advice regarding a particular case.

2. **Commander's Role.** The central role the commanding officer plays in the disciplinary and administrative processes cannot be overemphasized. Commanders make critical decisions at every stage, to include determining the initial disposition of alleged offenses, negotiating appropriate pretrial agreements, acting on the sentences of courts-martial, and deciding whether to grant clemency. Commanders may not, however, seek to influence decisions of subordinate commanders with respect to actions regarding military justice proceedings, punish or reward court members based on the results of courts-martial, or interfere with witnesses.

3. **Preliminary Inquiry.** The Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial, United States, (1998 Edition), establish military justice procedures. On receipt of information that a member of the command is suspected of committing an offense triable by court-martial, the accused's commander must make, or direct, a preliminary inquiry into the charges or suspected offenses. The commander determines the extent and form of the preliminary inquiry based on the circumstances of the case and the needs of the command. In some instances, the inquiry may be as informal as having a member of the command informally "check into" the allegations and give a verbal report back to the commander. In other instances, full criminal investigation by the Naval Criminal Investigative Service or other agencies may be necessary.

4. **Disposition Decision.** After receipt of the preliminary inquiry report, commanders decide how to dispose of

Tab J

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

allegations of offenses by members of their commands. Depending on the seriousness of the allegations, the state of the evidence, and a variety of other factors, commanders have several options:

a. **Article 32 Pretrial Investigation.** In cases involving allegations of serious misconduct, the commander may convene a formal investigation of the charges pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ) as a prerequisite to trial by general court-martial.

(1) An Article 32 investigation provides an initial hearing of the evidence relating to the charges alleged against a servicemember. The investigating officer must inquire into the truth of the matters contained in the charges, consider their form, determine whether they are supported by sufficient evidence to conclude the accused committed an offense, and ultimately recommend appropriate disposition of the charges to the commander.

(2) The accused may be represented by counsel, may call witnesses in his or her own behalf, and may testify or remain silent. Judge advocates, who are lawyers admitted to practice by a State bar and certified by the judge advocate general of their service, are appointed to represent an accused during Article 32 proceedings. Additionally, accused servicemembers may request a specific judge advocate, if reasonably available, or retain civilian counsel at their own expense, to represent them in conjunction with, or in lieu of, appointed military counsel.

(3) After reviewing the Article 32 investigating officer's report, the officer who convened the investigation may dismiss the charges, initiate administrative action, impose nonjudicial punishment (NJP), convene a summary or special court-martial if empowered to do so, or forward the case, with a recommendation for appropriate disposition, to an officer exercising general court-martial jurisdiction (if the original convening authority is not so empowered).

b. **Summary Court-Martial.** Summary courts-martial are not authorized to resolve charges against officers. A summary

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

court-martial is a judicial forum which provides a simple procedure for adjudicating relatively minor offenses.

(1) The single commissioned officer who is appointed as the summary court-martial officer acts as prosecutor, defense counsel, and judge. The summary court-martial officer decides the issue of guilt, and adjudges a sentence in the event of a guilty finding.

(2) The summary court-martial officer (normally a captain or above) must thoroughly and impartially investigate the charges from both sides, and must represent the interests of both the accused and the Government. A Marine may refuse trial by summary court-martial; in this case, the officer who convened the summary court may dismiss the charges, initiate administrative action, conduct an NJP hearing, refer the charges to a special court-martial, or convene an investigation pursuant to Article 32, UCMJ, to determine if trial by general court-martial is warranted.

(3) The United States Supreme Court has held that the Sixth Amendment's guarantee of assistance of counsel does not apply to a summary court-martial. Thus, an accused has no right to have a military defense counsel appointed to represent him at a summary court-martial. He may, however, retain a civilian counsel at his own expense. As in any criminal trial, the accused at a summary court-martial is presumed innocent, and the Government has the burden of proving guilt beyond a reasonable doubt. The rules of evidence which apply during a summary court-martial are the same as those that apply in special and general courts-martial. The accused has the right to confront and cross-examine the witnesses against him, to present relevant evidence in his own defense, and to testify or remain silent. If convicted, he may present evidence in extenuation and mitigation before any sentence is adjudged.

(4) The maximum punishment that may be adjudged at a summary court-martial is confinement for 30 days, reduction to the grade of private, and forfeiture of two-thirds pay per month for 1 month. However, a summary court-martial may not sentence pay grades E-5 and up to confinement or to reduction by more than one pay grade.

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

c. **Special Court-Martial.** A special court-martial is a judicial proceeding conducted in accordance with the Constitution of the United States and the UCMJ. As in any Federal criminal trial, the accused is presumed innocent, and the Government has the burden of proving guilt beyond a reasonable doubt. The rules of evidence are similar to those applied in the U.S. district courts. The accused has the right to confront and cross-examine witnesses, to present relevant evidence in his defense, and to testify or remain silent. The accused also has the right to choose trial by a military judge alone or trial by a military jury. If convicted, the accused may present evidence in extenuation and mitigation before any sentence is adjudged. The maximum punishment that may be adjudged at a special court-martial is confinement for 6 months, reduction to the grade of private, forfeitures of not more than two-thirds pay per month for 6 months, and a bad conduct discharge. (Although the National Defense Authorization Act of 2000 increased the maximum punishment to confinement for 12 months and two-thirds forfeitures of pay for 12 months, implementation of this increased punishment authority is pending amendment to the Manual for Courts-Martial.)

d. **General Court-Martial.** A general court-martial is a judicial proceeding similar to a special court-martial except the maximum punishment that may be adjudged at a general court-martial is based on limits established for the charged offenses by the President in the Manual for Courts-Martial. Depending on the severity of the offense, authorized general courts-martial punishments range from punitive censure, to punitive separation from the service (bad conduct or dishonorable discharge for enlisted; dismissal for officers), total forfeitures, confinement for life, or death. A punitive separation adjudged at a court-martial deprives the recipient of virtually all veterans' benefits, and may result in the loss of retirement pay. Only a general court-martial may sentence an officer to confinement or punitive separation from the service by dismissal. Further, an officer may not be reduced in grade by any court-martial. Accordingly, given the limited punishment available at special courts-martial, commanders generally refer charges against officers to general courts-martial if a judicial resolution is necessary.

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

e. **Nonjudicial Punishment (NJP)**. If a commander determines disciplinary proceedings less severe than a court-martial are appropriate, he or she may dispose of the charges under the authority of Article 15 of the UCMJ. Article 15 authorizes commanding officers and officers in charge to impose punishment, known as NJP, for relatively minor offenses without referring the case to a court-martial. Unless the accused is attached to or embarked on a vessel, the accused may refuse NJP and request a trial by court-martial.

(1) If an accused agrees to accept NJP, the NJP authority will conduct the hearing to determine whether NJP should be imposed and, if so, the type and amount of punishment. This hearing is not a trial, and the rules of evidence that apply at a court-martial do not apply. Before the hearing, the accused will be informed of the alleged offenses and be provided an opportunity to examine available evidence and statements. During the hearing the accused may present evidence on the merits of the case or the punishment, testify or remain silent, be accompanied by a personal representative or spokesman, and have present witnesses, including those adverse to the accused if they are reasonably available. What punishment is imposed is within the commanding officer's discretion, but the punishment must be within the limits imposed by Article 15 and the Manual for Courts-Martial.

(2) The maximum punishment that a commanding officer in the grade of major or above can impose at NJP upon enlisted personnel includes punitive censure, extra duties for not more than 45 days, restriction for 60 days, (if combined with extra-duties, restriction may not exceed 45 days), reduction one pay grade for sergeants and below, and forfeiture of one-half of 1 month's pay per month for 2 months.

(3) The maximum punishment an officer exercising general court-martial jurisdiction can impose upon commissioned or warrant officers is punitive censure, restriction for 60 days, arrest in quarters for not more than 30 days, and forfeiture of one-half of 1 month's pay per month for 2 months.

(4) A Marine who believes his NJP is unjust or disproportionate to the offense may appeal the punishment within five days to the commanding officer of the officer imposing the punishment. If the Marine submits the appeal more than five

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

days after receiving the punishment, the appeal may be denied as untimely unless the Marine shows good cause for the delay.

f. **No Action**. Finally, a commander may decide to take no action on an alleged offense. An initial decision to take no action does not bar later disposition of an offense in a different manner, or independent action, by a superior commander.

5. **Pretrial Restraint**. Under the UCMJ, four types of pretrial restraint may be imposed on a Marine facing trial by court-martial.

a. **Pretrial Confinement**

(1) A commanding officer may order a servicemember into pretrial confinement if he reasonably believes that the individual accused has committed an offense triable by special or general court-martial; that lesser forms of restraint are inadequate; and that the accused, if not confined, will flee before trial or engage in serious criminal misconduct.

(2) Within 48 hours after the beginning of the confinement, the commanding officer must prepare a memorandum stating the reasons for continued confinement. If the commanding officer does not prepare the memorandum, a neutral and detached officer must review the propriety of continued confinement within 48 hours. If the commanding officer does prepare the memorandum, a neutral officer will review whether continued confinement is appropriate within 7 days. The accused can request representation by a military counsel during this review proceeding. The accused and his counsel, if any, will be allowed to appear before the reviewing officer to make a statement. The reviewing officer may order continued confinement or order the release of the accused. This officer may later reconsider his initial decision to continue the accused's confinement if the accused provides significant information not previously considered.

(3) If the charges are referred to trial, the accused may request that a military judge review the propriety of the pretrial confinement. If the accused is convicted by the court-martial, the pretrial confinement served will be credited against any confinement adjudged by the sentencing authority.

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

b. **Arrest.** Arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits. A person under arrest does not normally perform military duties.

c. **Pretrial Restriction in Lieu of Arrest.** Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits. A restricted person normally continues to perform military duties.

d. **Conditions on Liberty.** Conditions on liberty are imposed by orders directing a person to refrain from doing certain acts. Such conditions may be imposed in conjunction with the other forms of restraint discussed above.

6. **Pretrial Negotiations.** In court-martial cases, commanders will often find themselves involved in pretrial negotiations. Accused servicemembers, through counsel, often seek pretrial agreements wherein they will plead guilty to some or all offenses, in exchange for the convening authority agreeing to suspend, or perhaps even to disapprove, part of the adjudged sentence. Agreements may also allow the accused, in return for his guilty plea, to appear in a less serious forum, such as special court-martial, summary court-martial or NJP, than would otherwise be the case. The trial counsel and, as appropriate, the SJA will advise and support the commander during the negotiation process. It is the commander's responsibility, however, to make all final pretrial decisions. Pretrial agreements are useful because they result in speedier resolution of charges, guarantee convictions, increase sentence predictability, protect witnesses from the rigors of the trial process, and save command man-hours and money that would be spent on a trial.

7. **Post-Trial Matters.** After each general court-martial, or each special court-martial imposing a bad conduct discharge, a verbatim record of trial will be prepared and forwarded to the convening authority, who must act on the sentence and may act on the findings of guilty. Before acting, the convening authority must consider the results of trial, any written matters submitted by the accused or his counsel, the staff judge advocate's recommendation concerning the sentence, and the defense counsel's response to that recommendation. The

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

convening authority may then approve, modify, or disapprove any finding of guilty; approve, disapprove, mitigate, or suspend all or part of the sentence; or order a rehearing.

8. **Courts-Martial Appeals.** The convicted servicemember may appeal his conviction by any court-martial. In fact, in most instances, his case will be reviewed automatically. For instance, those cases resulting in a bad conduct discharge or 1 year of confinement are automatically reviewed by the Navy-Marine Corps Court of Criminal Appeals. If the member is dissatisfied with the decision of that court, he may petition the U.S. Court of Appeals for the Armed Forces and, in limited circumstances, the U.S. Supreme Court for further review of his case. The servicemember is represented without charge by a military appellate defense counsel during these appeals. For general courts-martial where no punitive separation is imposed or the confinement imposed is less than 1 year, the Judge Advocate General of the Navy will automatically review the case. For special courts-martial not imposing a punitive discharge, the convicted servicemember may petition the Judge Advocate General of the Navy to review his case.

9. **Separation in Lieu of Trial by Court-Martial.** An enlisted Marine facing a trial by special or general court-martial may submit a written request for an administrative discharge in lieu of trial by court-martial (sometimes mistakenly called a "GOS" discharge). Marine Corps regulations require that a Marine who submits such a request be afforded the opportunity to discuss this decision with a lawyer. In the request, the Marine must acknowledge that he understands the elements of the offense or offenses charged, that the discharge may be characterized as under other than honorable conditions, and that he recognizes the adverse nature and possible consequences of an other than honorable discharge. In addition, the Marine must admit that he committed one or more of the offenses charged for which a punitive discharge could be adjudged if the case were tried by a court-martial. The request, which must originate with the accused and his defense counsel, is forwarded via the chain of command to the officer exercising general court-martial jurisdiction. That officer decides whether to grant or to deny the request. This decision is within his discretion and is based on the nature of the case, his review of the Marine's service record, and the recommendations of the chain of command. Accused officers may also request a separation in lieu of trial

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

by court-martial; the approval authority, however, is the Secretary of the Navy.

10. Administrative Measures

a. **General.** As an alternative to, or in conjunction with disciplinary proceedings, a commander may initiate administrative action based on a report of misconduct. Administrative actions include administrative separation from the service and corrective measures such as counseling, admonition, reprimand, extra military instruction, administrative withholding of privileges, and negative performance evaluations.

b. **Administrative Separation.** Marines may be administratively separated based on a documented record of misconduct. In such cases, the Marine will be notified of the commanding officer's recommendation for separation, the recommended character of the discharge, and his rights during the separation proceedings. Those rights include the right to discuss the case with a military lawyer and may include the right to present the case before an administrative discharge board with the assistance of that lawyer. If the Marine elects to present his or her case before a board, the board will recommend either that he be retained or that he be separated; if it recommends separation, the board must also recommend an appropriate characterization of service. A record of the separation proceedings will then be forwarded to the commanding general. For enlisted Marines, the commanding general acts as the separation authority. Before making the final determination in the case, the commanding general will review the Marine's service record, the recommendations of the officers in his chain of command, and the recommendations of the administrative discharge board (if the Marine presented his or her case before a board). For officers, the record of separation proceedings is forwarded, via the chain of command, to the Secretary of the Navy, who acts as the separation authority.

11. **Conclusion.** The disciplinary and administrative measures described above have survived extensive administrative and judicial review. They are designed to provide the servicemember and his accusers with a forum where the truth may be discovered, justice may be served, and discipline may be maintained. The procedures strike a careful balance between maintaining the good

**Subj: PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY;
CONVENING AUTHORITY CONSIDERATIONS**

order and discipline of our armed forces and protecting the rights of the accused. Commanders are the key decision makers in this system, and the SJA and trial counsel are the commander's primary advisers.

POINT PAPER

Subj: LEGAL AUTHORITY OF FROCKED OFFICERS

Ref: (a) U.S. Const. art. II, § 2, cl. 2
(b) DoD Directive 1334.2 of 13 Mar 87
(c) MCO P1400.13 (MARCORPROMAN)

1. This paper explains the legal authority of frocked officers.

2. **Background.** Reference (a) enumerates three steps necessary to promotion: (1) nomination by the President; (2) consent of the Senate; and (3) appointment by the President. An officer is not legally promoted until all three steps have occurred. An appointment cannot properly be issued until a vacancy occurs in the grade to which the officer selected for promotion is being promoted. The first two steps often occur months before the third step. Frocking is intended to ameliorate the effects of this delay.

3. **DoD Directive.** Reference (b) was implemented to manage the frocking of field grade and general officers within DoD. This directive contains the following provisions:

a. A frocked officer is entitled to "wear the insignia" and to "assume the title" of the next higher grade.

b. Before an officer can be frocked, the officer must have cleared the first two hurdles for promotion: (1) nomination by the President and (2) consent of the Senate.

c. The directive added two other requirements for frocking: (1) frocking must be essential to the officer's maximum effectiveness in the assigned billet; and (2) the officer being considered for frocking must be serving in an authorized billet designated for the higher grade, or must be in the process of being ordered to such a billet.

d. Finally, the directive requires the officer to be informed that frocking is not a promotion, and that until actual promotion the officer does NOT:

Tab K

Subj: LEGAL AUTHORITY OF FROCKED OFFICERS

- (1) Accrue monetary entitlements;
- (2) Gain seniority on the active duty list or for any other purpose;
- (3) Accumulate time in grade;
- (4) Assume the legal authority of the higher grade.

4. **Summary.** A frocked officer can assume the title and wear the insignia of the higher grade, but pursuant to reference (c), frocking in and of itself will not increase the disciplinary authority a commanding officer possesses under Article 15, Uniform Code of Military Justice. For instance, a captain frocked to major may not impose the greater punishments listed in Article 15(b) (2) (H).

POINT PAPER

Subj: SETTING ASIDE NONJUDICIAL PUNISHMENT (NJP)

1. **Purpose.** To explain the authority, effect, and basis for setting aside nonjudicial punishment (NJP).
2. **Authority to Set Aside NJP.** Paragraph 6.d of Part V, Manual for Courts-Martial, United States (1998 Edition) (Part V, MCM), authorizes an NJP authority to set aside all or part of an NJP previously imposed upon a Marine in his unit. Section 0118b of JAGINST 5800.7C (JAGMAN), provides that an NJP authority may only set aside punishments that he has the power to impose. The set-aside power may be exercised with respect to both permanent members of a command and members assigned to a command under temporary additional duty orders. The power includes the power to suspend or mitigate punishment. Additionally, under paragraph 7f(1) of Part V, MCM, the appellate authority (or his successor in command) may set aside NJP.
3. **Effect of Setting Aside NJP.** Setting aside NJP has the effect of voiding the punishment and restoring the rights, privileges, and property the Marine was deprived of. Pursuant to paragraph 2005 of MCO P5800.16 (LEGADMINMAN), all entries pertaining to the set-aside punishment must be removed from the Marine's service record.
4. **Basis for Setting Aside NJP.** The power to set aside NJP is a matter within the sole discretion of the appropriate authority (as described above). Paragraph 6d of Part V, MCM provides general guidance for exercising such discretion. Setting aside NJP is an action that should be reserved for compelling circumstances where the commander determines that punishment has resulted in a clear injustice. Whether an NJP resulted in a "clear injustice" is a decision within the appropriate authority's discretion. Note, however, that setting aside NJP is an extraordinary remedy and should not be used as a substitute for suspending punishment or granting some other form of clemency. Further, commendable service following an NJP is not an appropriate basis for setting aside an NJP that was fair at the time it was imposed.

Tab K

Subj: SETTING ASIDE NONJUDICIAL PUNISHMENT (NJP)

5. **Time limits**. The power to set aside an NJP should ordinarily be exercised within a reasonable time after the punishment has been executed. Absent unusual circumstances, 4 months is considered a reasonable time. Whether "unusual circumstances" justify setting aside punishment later than 4 months after execution is a matter of command discretion. Paragraph 3005.c of the LEGADMINMAN allows suspension--as opposed to set aside--of an executed punishment of reduction or forfeiture only within 4 months of the date it is executed.

6. **Summary**. The commander who initially imposed NJP, his successor in command, the commander of a Marine's new unit, or the NJP appellate authority may set aside NJP. Setting aside NJP voids the NJP outright. NJP should only be set aside, however, when the appropriate authority determines that an NJP resulted in a clear injustice. Finally, before setting aside an NJP, commanders should ask themselves whether they are in a better position, notwithstanding the passage of time, than the previous commander was to decide whether punishment was warranted.

INFORMATION PAPER

Subj: ADMINISTRATIVE AND DISCIPLINARY OPTIONS FOR OFFICER MISCONDUCT

1. **Purpose.** This paper provides an overview of the administrative and disciplinary options available to commanders when disposing of officer misconduct cases.

2. **Administrative Options.** A commander may initiate, or take, a variety of administrative actions when disposing of officer misconduct. A commander's options include:

a. **Issuing a Nonpunitive Letter.** A nonpunitive letter of censure is a personal letter from the commander to the officer and is not included in the officer's OMPF. Although the letter's issuance should not be mentioned in subsequent fitness reports, the underlying misconduct that resulted in the letter may be commented upon.

b. **Requesting SecNav Issue a Secretarial Letter of Censure.** This letter is included in the OMPF, and the officer has the option to submit written matters in rebuttal to the letter. Submit request via chain of command to DC/S M&RA.

c. **Requesting CMC Issue a Letter of Counseling.** This letter is also included in the OMPF, and the officer has the option of submitting written matters in rebuttal to the letter. Submit request via chain of command to DC/S M&RA.

d. **Requesting Administrative Separation.** A recommendation for administrative separation is made to DC M&RA, who has been designated by SecNav as the Show Cause Authority for Marine officers. DC M&RA has the authority to convene boards of inquiry (BOI) or to direct boards be convened by commanding generals.

(1) All board recommendations are forwarded to DC M&RA. If the board decision is to retain an officer, DC M&RA closes the case. If the board recommends separation, DC M&RA forwards the case with a recommendation to SecNav. SecNav is the separation authority for officers.

Tab M

Subj: ADMINISTRATIVE AND DISCIPLINARY OPTIONS FOR OFFICER MISCONDUCT

(2) An officer respondent at a BOI has the right to be represented by an appointed military lawyer, to retain civilian counsel, to present evidence, and to question witnesses. A respondent also has the right to comment on the BOI report that is forwarded to SecNav via DC M&RA.

3. **Disciplinary Options/Process.** Commanders also have a broad spectrum of disciplinary measures that they may use when disposing of officer misconduct. A commander's options include:

a. **Nonjudicial Punishment (NJP).** A commander must be convinced, by a preponderance of evidence, that the officer committed the misconduct before NJP may be imposed. NJP is imposed for minor offenses.

(1) NJP punishments may include a punitive letter of censure, forfeiture of pay, and restriction to quarters/base/and other places.

(2) As with all Marines, officers may refuse NJP (unless embarked on a vessel). They also have the right to appear at the hearing, present evidence, and to question witness. Officers may appeal their NJP punishment to next the superior officer.

b. **Convening a Special Court-Martial (SPCM).** Note, however, that a SPCM may not sentence an officer to confinement or dismissal.

c. **Referring Charges to an Article 32, UCMJ, Pretrial Investigation.** Unless waived, an Article 32 hearing is the prerequisite for a general court-martial (GCM). The Article 32 investigation officer makes a recommendation as to how the charges should be disposed of (i.e., dismiss charges, administrative measures, NJP, or court-martial). An Article 32 hearing is analogous to a civilian grand jury. An accused Marine at an Article 32 hearing has the right to be represented by an appointed military lawyer, or he may retain civilian counsel. Accused Marines have the right to appear, to present evidence, and to question witnesses.

Subj: ADMINISTRATIVE AND DISCIPLINARY OPTIONS FOR OFFICER MISCONDUCT

d. **Referring Charges Against an Officer to a General Court-Martial (GCM)**. Note: Charges cannot be referred to a GCM until after an Article 32 hearing has been held, unless waived by the respondent. Only a commanding general, with general court-martial convening authority, may refer a case to a GCM. A GCM is the military's highest level of criminal proceedings, and an officer, if convicted, may receive the full range of authorized punishments.

4. **Summary**. The command SJAs should be advised of each officer misconduct case. CMC has tasked the SJAs with the responsibility of reporting and tracking officer misconduct throughout the Marine Corps. Your SJA is well-versed in the applicable reporting requirements.

Prepared by: M. FAHRINGER, Capt, USMC
HQMC (JAM) 614-4250

INFORMATION PAPER

Subj: ADMINISTRATIVE SEPARATION FOR HOMOSEXUAL CONDUCT

1. **Purpose**. This paper provides information on investigating and processing Marines for administrative separation based upon homosexual conduct. As noted in paragraph 5c below, the provisions on administrative separation for homosexual conduct do not preclude disciplinary action under the UCMJ, in appropriate cases.

2. **Policy**

a. Homosexual conduct² is grounds for separation from the Marine Corps under paragraph 6207 of MCO P1900.16 (MARCORSEPMAN). Homosexual status, i.e. "sexual orientation" alone, is considered a personal and private matter. It is not a bar to continued service unless manifested by homosexual conduct.

b. The Congressional Findings that support the policy concerning homosexual conduct in the armed forces are incorporated in Marine Corps policy at MARCORSEPMAN 6207.1(b). These findings establish the "rational basis" for separation of Marines who engage in homosexual conduct. Administrative discharge boards (enlisted personnel) and boards of inquiry (officers) are required to be informed of these findings. These findings include the following:

(1) There is no constitutional right to serve in the armed forces.

(2) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

Tab MC

² Homosexual conduct includes homosexual acts, a statement that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects sexual orientation, but because the statement indicates a likelihood that the Marine engages in or intends to engage homosexual acts.

Subj: ADMINISTRATIVE SEPARATION FOR HOMOSEXUAL CONDUCT

(3) The armed forces must maintain personnel policies that exclude certain individuals whose presence in the armed forces would create an unacceptable risk to the armed forces high standards of morale, good order and discipline, and unit cohesion.

(4) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion, which are the essence of military capability.

3. **Bases for Administrative Separation.** A Marine **shall** be separated if one or more of the following approved findings is made:

a. The Marine has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts³; unless there are further approved findings that: (1) such acts are a departure from the member's usual and customary behavior; (2) such acts, under all the circumstances, are unlikely to recur; (3) such acts were not accomplished by use of force, coercion, or intimidation; (4) under the particular circumstances of the case, the member's continued presence in the Marine Corps is consistent with the interests of the Marine Corps in proper discipline, good order, and morale; and (5) the member does not have a propensity or intent to engage in homosexual acts.

b. The Marine has made a statement that he or she is a homosexual or bisexual, or words to that effect⁴ unless there is a further approved finding that the Marine has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

³ "Homosexual act" means any bodily contact actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act (for example, hand-holding or kissing, in most circumstances).

⁴ Statement by a Marine that "he or she is a homosexual or bisexual, or words to that effect" means language or behavior that a reasonable person would believe intends to convey the statement that a person engages in or has a propensity to engage in homosexual acts. This includes statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," "I engage in homosexual acts," and similar statements.

Subj: ADMINISTRATIVE SEPARATION FOR HOMOSEXUAL CONDUCT

c. The Marine has "married"⁵ or attempted to marry a person known to be of the same sex, as determined by the external anatomy of the persons involved.

4. Inquiry

a. Responsibility. Only the Marine's commander is authorized to initiate fact finding inquiries involving homosexual conduct. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

b. Inquiries must be limited to the factual circumstances directly relevant to the specific allegation.

c. At any point of the inquiry, the commander or appointed inquiry official must be able to clearly and specifically explain, which basis for separation he or she is attempting to verify and how the information being collected relates to this specific separation basis.

d. A commander may initiate an inquiry only if he or she has credible information that a basis for discharge exists. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a Marine has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

5. Disposition

a. Based on the inquiry described above, the commander must determine whether there is probable cause (a reasonable belief) to believe a basis for administrative separation exists. If the commander determines probable cause exists, the commander shall initiate administrative separation processing.

b. If the commander determines probable cause does not exist, the commander shall terminate the inquiry and any administrative action already initiated.

⁵ As of this writing, no State recognizes homosexual "marriages" as such. Vermont recognizes homosexual "civil unions," however, and entry into such a union would constitute homosexual conduct.

Subj: ADMINISTRATIVE SEPARATION FOR HOMOSEXUAL CONDUCT

c. Certain homosexual conduct may constitute both a basis for administrative separation processing and a violation of the UCMJ. The UCMJ requires all allegations of misconduct to be thoroughly investigated. Upon review of the results of the investigation, the cognizant commander has discretion to determine what, if any, disciplinary action is appropriate. The provisions for administrative discharge for homosexual conduct do not preclude disciplinary action under the UCMJ when such action is deemed appropriate by the cognizant commander. In this regard, there is no right on the part of any individual to demand trial by court-martial in lieu of administrative separation processing.

6. Separation Authority

a. For an enlisted Marine, the officer exercising general courts-martial convening authority over the Marine (his or her commanding general) is the separation authority.

b. CMC is the separation authority if the Marine is an enlisted active duty Marine with 18 years or more of service.

c. SecNav is the separation authority if the Marine is an enlisted member of the USMCR with 18 years or more of service.

d. SecNav is the separation authority for all officers.

7. Problem Areas

a. Ambiguous/Unsupported "homosexual" statements.

b. "Credible information" - Inquiries must be based on "credible information" that a basis for separation exists. The following, *standing alone*, do not constitute "credible information" of homosexual conduct: mere rumor, suspicion, or opinion that a Marine is a homosexual or has engaged in homosexual conduct; information that a Marine patronized a "gay bar" or associated with known homosexuals; possession of homosexually oriented publications; or proof that a Marine marched in a homosexual-rights parade. Additionally, the fact that a servicemember reports being threatened because he or she is perceived to be a homosexual does not by itself constitute credible information justifying the initiation of an investigation of the threatened servicemember. Inquiries must

Subj: ADMINISTRATIVE SEPARATION FOR HOMOSEXUAL CONDUCT

be limited to the specific facts (date, time, place, participants, witnesses) that form the basis for separation.

c. On 24 Mar 97, the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) created a new "credible information" exclusion. Specifically, the mere fact that a servicemember reports that he or she has been threatened, harassed, or harmed because others *believe* he or she is homosexual does not, by itself, constitute credible information upon which an inquiry can be initiated. Commanders are expected to investigate the threatening behavior without delving into the sexual orientation of the victim.

8. DoD Policy Memoranda

a. On 12 Aug 99, USD(P&R) sent two memoranda to the Secretaries of the Military Departments entitled "Guidelines for Investigating Threats Against or Harassment of Service Members based on Alleged Homosexuality" and "Implementation of Recommendations Concerning Homosexual Conduct Policy." These memoranda direct the Secretaries to take certain actions with respect to the DoD Homosexual Conduct Policy.

b. "Guidelines for Investigating Threats Against or Harassment of Service Members based on Alleged Homosexuality" reiterates the existing policy requiring commanders to hold servicemembers who threaten or harass others based on alleged homosexuality fully accountable. This same policy prohibits using a servicemember's report of such harassment as a basis for initiating investigation of that servicemember for homosexual conduct. The memorandum directs that the policy be disseminated to all levels of command and be incorporated in existing training programs for law enforcement personnel, commanders, and supervisors. Additionally, the policy must be included in training required under section 654(d) of title 10 (mandatory briefing that enlisted members receive upon entry into service, and periodically thereafter, concerning the UCMJ).

c. "Implementation of Recommendations Concerning Homosexual Policy Conduct " discusses recommendations contained in the 1998 *Review of Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*. The memorandum directed Service Secretaries to issue guidance recommending that "installation level" staff judge advocates consult with senior level officers at higher headquarters prior

Subj: ADMINISTRATIVE SEPARATION FOR HOMOSEXUAL CONDUCT

to investigation into alleged homosexual conduct; to ensure that initiation of any "substantial investigation"⁶ of homosexual statements is approved at the Military Department secretarial level; and to ensure that Service Inspectors General include the training of personnel charged with application and enforcement of the homosexual policy as an inspection item.

d. MARADMIN 014/00 was issued in response to SecNav direction that followed the SecDef memoranda.

e. On 13 Dec 99, while the Services were still developing implementation of the August 1999 direction, SecDef ordered DoDIG to survey the environment with respect to the homosexual conduct policy. The survey's charter included direction to measure tolerance of disparaging speech about homosexuality in general, in addition to actual harassment. The DODIG survey report of 16 March 2000 noted 80 percent of the survey population reported hearing jokes, "offensive speech," etc. about homosexuality in general, and that 37 percent of the survey population reported observing what they considered "harassment." On 24 March 2000, SecDef tasked the working group with developing measures to address harassment based on perceived sexual orientation and "other issues" raised by the DODIG survey report of 16 March. In context, "other issues" referred to jokes etc. about homosexuality in the abstract.

f. On 21 July, SecDef approved the working group's draft action plan. The main recommendations of the plan included: adoption of an "overarching principle" regarding harassment in general, including that based on sexual orientation; Service review of training to ensure incorporation of overarching principle; Service review of means for members to report mistreatment, harassment, or "inappropriate comments or gestures," and to ensure that application of "don't ask, don't tell" in reporting context is understood; Service action to ensure appropriate command response in cases of mistreatment, or tolerance of same; and Service action to ensure that inspection programs measure command compliance with plan and effectiveness of plan.

⁶ In accordance with similar guidance issued by the other services, ASN(M&RA) subsequently defined a "substantial investigation" as one that is conducted to test the sincerity of a statement and that goes beyond questioning 1) the servicemember who made the statement; 2) witnesses who heard the statement; 3) the servicemember's immediate chain of command; and, 4) persons suggested by the servicemember.

Subj: ADMINISTRATIVE SEPARATION FOR HOMOSEXUAL CONDUCT

g. Significant Distinctions. The action plan is a general "anti-harassment" plan, it is not an anti homosexual-harassment plan. Whether untargeted derogatory jokes or comments about homosexuality in the abstract are, in context, "inappropriate" is left to commander's discretion, as is the decision of whether corrective action is necessary. Finally, the statutory homosexual conduct policy is still that homosexual conduct, in the form of homosexual acts, statements, or marriages, is incompatible with military service and will result in separation.

9. Summary. Cases involving homosexual conduct will continue to draw the closest scrutiny. We must ensure careful compliance with all relevant regulations.

Prepared by: H. W. FRANK, Maj, USMC
HQMC (JAM) 614-4250

INFORMATION PAPER

Subj: INTERNATIONAL CRIMINAL COURT

1. **Issue.** On 31 Dec 00, the former POTUS authorized U.S. signature of the Rome Statute of the International Criminal Court (ICC), even though the ICC treaty's flaws have not been addressed. The purpose of this paper is to update the senior leadership of the Marine Corps on the ramifications of this signature, and the new administration's position on the ICC.

2. **Discussion**

a. On 17 Jul 98, 120 nations (not including the United States) approved a treaty to create a permanent ICC. The United States objects to the ICC treaty because it would allow the ICC to prosecute U.S. servicemembers without U.S. consent, even if the United States is not a party to the ICC treaty.

b. By signing, however, the United States was placed in a position where it could no longer take any actions that would defeat the object and purpose of the treaty. In other words, the United States could not oppose the treaty, and/or seek to block its ratification by other nations. As of 12 Feb, 29 nations have ratified the ICC treaty. It takes 60 nations to bring the ICC treaty into force.

3. **Present Position.** On 26 Feb 01, DoS issued guidance to the U.S. ICC Preparatory Commission (PrepCom) delegation. The PrepCom met in NY, from 26 Feb, to 9 Mar. The cable reiterated that the United States has fundamental concerns about the ICC treaty; that the present administration will not submit the ICC treaty to the Senate for advice and consent; that our small delegation's presence was solely to participate in the negotiations on the definition of the crime of aggression; and, that the presence of our small delegation should not be misconstrued by anyone as implying support by the United States for the ICC treaty, as the United States does not support it. The DoS cable also stated that the administration would conduct a high-level review of ICC policy.

Prepared by: J. A. RUTIGLIANO, GS-14 HQMC (JAO) 614-2793

INFORMATION PAPER

Subj: SPOUSE AND CHILD SUPPORT REQUIREMENTS

Ref: (a) MCO P5800.16A (LEGADMINMAN), Chapter 15

1. **Issue.** What are the requirements for support of a Marine's family members?

2. **Background.** Reference (a) requires Marines to provide adequate and continuous support for their spouses and children and to comply with the terms of legally binding separation agreements and court orders. Failure to do so tends to bring discredit on the Marine Corps and, therefore, may result initiation of administrative or disciplinary action.

3. **Summary of Chapter 15**

a. **Punitive.** Failure to support spouses and children is now punishable under the UCMJ as a violation of a lawful general order. Failure of a Marine to comply with a support provision of a court order, the financial support provision of a legally binding written separation agreement between the parties, or the support standards contained in the chapter (absent a valid waiver), is punishable under the Uniform Code of Military Justice.

b. **Support Standards.** In the absence of a court order or legally binding written separation agreement between the parties, the following interim support requirements shall apply: (Note that gross pay is defined as basic pay and BAH, but does not include hazardous duty pay, incentive pay, or basic allowance for subsistence.)

(1) Single family

(a) For a single family living in Government housing (civilian spouse): interim support shall be \$200.00 per supported person, up to a maximum of 1/3 gross pay, per month.

Tab O

Subj: SPOUSE AND CHILD SUPPORT REQUIREMENTS

(b) For a single family not living in Government housing (civilian spouse): interim support shall be either \$200.00 per supported family member, or BAH at the "with dependents" rate, whichever is greater, up to a maximum of 1/3 gross pay, per month.

(2) Multiple families (not including a spouse in the armed forces): interim support for each family member shall be either \$200.00 per supported family member, or the pro-rata share of BAH at the "with dependents" rate, whichever is greater, up to a maximum of 1/3 gross pay, per month.

(3) Both spouses in the armed forces

(a) No children of the marriage: no support obligation, regardless of any disparities in pay grade.

(b) All the children of the marriage in the custody of one spouse: interim support shall be either \$200.00 per supported child, or BAH at the "with dependents" rate, whichever is greater, up to a maximum of 1/3 gross pay, per month.

(c) If custody of children of the marriage is divided between the two parents: interim support shall be either \$200.00 per supported family member, or the pro-rata share of BAH at the "with dependents" rate, whichever is greater, up to a maximum of 1/3 gross pay, per month.

c. Form and Timing of Financial Support Payments. Support amounts required pursuant to this order will be paid until a court order or written agreement is obtained. Unless otherwise required by court order or by written financial support agreement, a financial support payment will be made in one of the following ways:

- (1) Check;
- (2) Money Order;
- (3) Electronic transfer;
- (4) Voluntary allotment;
- (5) Cash;

Subj: SPOUSE AND CHILD SUPPORT REQUIREMENTS

(6) Involuntary allotment (only with a court order); or

(7) Garnishment (only with a court order).

d. **Exception to direct payments.** A commanding officer may direct compliance with the financial support requirements of this regulation through in-kind financial support. For example, the Marine may be directed to pay non-Government housing expenses on behalf of family members, automobile loans, or charge accounts.

4. **Enforcement.** Commanding officers are responsible for the enforcement of the chapter. Resort to the Uniformed Code of Military Justice to enforce support obligations, however, should be used sparingly.

5. **Advice.** Assistance and advice may obtained from your local staff judge advocate or CMC (JAL) at DSN 224-3886/0 or (703) 614-3886/3880.

INFORMATION PAPER

Subj: TAX DEDUCTIONS FOR EXPENSES INCURRED AS A VOLUNTEER

1. The Internal Revenue Code allows volunteers to claim deductions for charitable contributions. These charitable contributions should be reported as miscellaneous itemized deductions on Schedule A, IRS Form 1040. These itemized deductions are only allowable to the extent they exceed two percent of the taxpayer's adjusted gross income. The total deductions on Schedule A must exceed the standard deduction in order to be claimed. Volunteers need to keep records of their expenses and may have to meet other IRS reporting requirements.
2. The IRS allows volunteers to deduct some unreimbursed expenses as charitable contributions, but they cannot place a value on their services and deduct this value on their taxes. There's a good reason for this. Since they did not expend any money in donating these services, they don't have any expense to claim.
3. To be deductible, the expenses must be unreimbursed, directly connected with their volunteer work, incurred solely because they were providing these volunteer services, and cannot be regular personal, living or family expenses.
4. If volunteers use their own pencils, paper and other supplies while performing charitable services, they can deduct these costs. Volunteers cannot deduct the cost of consumable supplies which they retain even though they used them in performing their volunteer work.
5. Any transportation expenses paid while serving as a volunteer are deductible. And, volunteers may deduct the amount actually paid for gas and oil, or use the standard rate per mile approved by the IRS. Volunteers can deduct the cost of commuting from their home to the place where they performed their volunteer work. (This is different from the rule on commuting to place of employment, the costs of which are never deductible.)

Tab P

Subj: TAX DEDUCTIONS FOR EXPENSES INCURRED AS A VOLUNTEER

6. Volunteers cannot deduct the costs of general maintenance, insurance, tires, and similar items, or claim the depreciation allowance for the use of their car, such as they could if they were using it for business purposes.

7. Volunteers can deduct reasonable amounts for food and lodging which they paid while away from home overnight so long as they incurred these expenses solely as a consequence of performing the charitable work. 100 percent of the lodging expense and 50 percent of the amounts paid for food are deductible. To qualify for the deduction:

a. The volunteer had to incur the expenses while away from home, and

b. The travel cannot have had any "significant element of personal pleasure, recreation or vacation."

8. Volunteers can deduct the cost of buying and maintaining a uniform required while performing the charitable work if the uniform (such as a Red Cross uniform) is not suitable for regular wear. Volunteers cannot deduct child care expenses, however, because they are only indirectly connected with their volunteer work.

9. To deduct out-of-pocket expenses as a charitable contribution, volunteers must have worked for a qualified organization. As an example, the IRS treats elements of the Marine Corps, funded with either appropriated or nonappropriated funds, in the same manner as it does the United States. So, if a volunteer makes a gift exclusively for a public purpose to a Marine Corps appropriated or nonappropriated fund activity, they will qualify for the deduction.

10. If the activity is an integral part of the Marine Corps, shares in fulfilling its duties, and is protected by the same immunities extended to the Marine Corps itself, a gift to the activity will qualify as a charitable contribution.

11. The rules are not as clear as they might be, but the IRS has followed them for a long time and it is unlikely they will change in the near future. Consult your Staff Judge Advocate or Legal Assistance Office if you have any questions.

JAL
Mar 01

INFORMATION PAPER

Subj: CITIZENSHIP APPLICATIONS BY MARINES

Ref: (a) MARADMIN 040/99

1. **Issue.** What assistance is available to active-duty Marines who desire to apply for citizenship ?
2. **Background.** In January 2000 the DoD entered into an agreement with INS to expedite the processing of certain naturalization applications for military members. There is generally a serious backlog in INS in the processing of naturalization applications - the wait has been up to 3 years. This problem is especially burdensome for military members since certain clearances and overseas assignments are related to citizenship status.
3. **Description of Program.** The local legal assistance office is now the primary point of aid for active duty Marines who apply for citizenship. The legal assistance office stocks all INS forms necessary for citizenship applications based upon qualifying military service, and has staff experienced in the Marine Corps / INS program. Where previously an applicant had to forward various forms to different agencies for completion and processing, and wait for consolidation at one of many INS processing centers around the country, the new program allows complete application assembly at the local legal assistance office, and creates a single INS processing center for processing of such applications.
4. Since the program has started, processing times for citizenship applications from active-duty Marines has been reduced to six months. Both the Marine Corps and INS have dedicated single points of contact to track the progress of applications. Specific guidance regarding the details of the program is available in the reference.
5. **Advice.** Assistance and advice may obtained from your local staff judge advocate or CMC (JAL) at DSN 224-3886/0 or (703) 614-3886/0.

Tab Q

INFORMATION PAPER

Subj: IMPROPER INSURANCE SOLICITATIONS ABOARD BASE

Ref: (a) DoD Directive 1344.7 Personal Commercial Solicitation
on DoD Installations, February 13, 1986
(b) SECNAVINST 1740.2D, Solicitation and the Conduct of
Personal Commercial Affairs on Department of Navy
Installations

1. **Issue.** What are the standards governing the conduct of personal commercial solicitations aboard DoD installations?

2. **Background.** In the last several years, the DoD has witnessed a surge in improper life insurance sales practices directed at servicemembers aboard DoD installations. Such practices take various forms, ranging from erroneous descriptions of the products sold, to insurance agents presenting themselves as disinterested financial advisors, not disclosing that they receive compensation for selling insurance products to consumers. These salesmen are frequently introduced onto military bases cloaked in military-sounding organizations, which are normally nothing more than alter egos of insurance companies. The victims are most often young enlisted servicemembers who are most vulnerable to these sales tactics, and can least afford to invest unwisely. The problem has become so acute that in March of 1999, the Office of the Inspector General, Department of Defense, issued an Evaluation Report recommending various immediate protective measures. A DoD working group has formed to conduct a review of the problem, and suggest additional remedies.

3. The references provide measures to ensure, as much as possible, that on-base solicitations are conducted in an appropriate manner. No person has the authority to enter upon a DoD installation as a matter of right. Personal commercial solicitations are permitted only if the applicants are duly licensed under appropriate state and Federal regulations, such solicitation is permitted by the local installation commander, and a specific appointment has been made with the individual concerned and conducted in family quarters or in other areas designated by the installation commander.

Tab R

Subj: IMPROPER INSURANCE SOLICITATIONS ABOARD BASE

4. Summary of Standards

a. The following solicitation practices are prohibited on base:

- Contacting members who are in an "on duty" status.
- Solicitation to a mass or captive audience.
- Soliciting without an appointment in housing areas.
- Use of military identification cards to gain access to installations for solicitation purposes.
- Using rosters of DoD personnel.
- Offering unfair, improper, and deceptive inducements to purchase or trade.
- Using rebates to facilitate transactions or to eliminate competition.
- Using manipulative, deceptive, or fraudulent devices, schemes, or artifices, including misleading advertising and sale literature.
- Suggesting that the DoD sponsors or endorses any particular company or product.
- The sale of insurance products by full-time DoD personnel to those who are junior in rank or grade.
- Entering into any unauthorized or restricted area.
- Using any portion of installation facilities, including quarters, as a showroom or store for the sale of goods or services.
- Soliciting door to door.

Subj: IMPROPER INSURANCE SOLICITATIONS ABOARD BASE

- Advertising address or telephone numbers of commercial sales activities conducted on the installation, except authorized activities conducted by members of military families residing in family housing.

5. Reference (a) provides the following grounds for taking action to deny or revoke permission to a company and its agents to conduct commercial activities on military installations.

- Failure to meet licensing and other regulatory requirements.
- Commission of any of the practices prohibited as listed above.
- Substantiated complaints or adverse reports regarding the quality of goods, services, and commodities and the manner in which they are offered.
- Knowing and willful violations of the Truth in Lending Act.
- Personal misconduct by a company's agent or representative while on the installation.
- The possession or any attempt to obtain supplies of allotment forms used by the Military Departments, or possession or use of facsimiles thereof.
- Failure to incorporate and abide by the Standards of Fairness policies contained in DoD Directive 1344.9, Indebtedness of Military Personnel, May 7, 1979.

6. **Enforcement.** Installation commanders are responsible for the enforcement of these regulations, and have authority to ban agents who violate these standards. However, commanders must be judicious in restricting access to their bases. Use of this responsibility must temper the need to protect the local military community from improper commercial solicitations, with the need to maintain favorable civilian community relations by

Subj: IMPROPER INSURANCE SOLICITATIONS ABOARD BASE

fair and equitable treatment of local businesses. Normally, use of this authority should be limited to restricting installation access of specific individuals, and should not be extended to entire companies, absent compelling circumstances.

7. **Advice.** Assistance and advice may obtained from your local staff judge advocate or CMC (JAL) at DSN 224-3886/0 or (703) 614-3886/0.